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## **FREEDOM OF INFORMATION ACT REQUEST**

National Freedom of Information Officer  
U.S. Environmental Protection Agency  
1200 Pennsylvania Avenue, NW (2822T)  
Washington, DC 20460

Regional Freedom of Information Office  
U.S. EPA, Region 10  
Office of Ecosystems, Tribal and Public Affairs  
1200 6<sup>th</sup> Avenue ETPA-124  
Seattle, WA 98101

**Re: Freedom of Information Act Request Regarding Oregon's Department of  
Environmental Quality's NPDES Permit Backlog and Practice of Administratively  
Continuing Permits**

Dear FOIA Officers:

Pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, *et seq.*, Earthrise Law Center, on behalf of the Northwest Environmental Advocates (NWEA), requests copies of public records in the custody of the U.S. Environmental Protection Agency (EPA), as identified below.

NWEA is a non-profit environmental watchdog organization dedicated to preserving and protecting natural resources in the Northwest. NWEA works through education, advocacy, and litigation to protect and restore water quality in Washington, Idaho, Oregon, and across the nation. The organization has a long history of interest and involvement in environmental issues in the Northwest, in particular seeking to use the Clean Water Act programs to restore and maintain water quality for the protection of human health, fish, and wildlife. NWEA is requesting the records described below in furtherance of its organizational mission.

This FOIA request concerns EPA's review of Oregon's implementation of the National Pollutant Discharge Elimination System (NPDES) program. Specifically, this request concerns documents and communications in the possession of EPA regarding Oregon's Department of Environmental Quality's (DEQ) failure to issue NPDES permits in a timely manner and its

practice of failing to act on completed applications for renewal resulting in NPDES permits being "administratively continued."

### **Factual Background**

Oregon has a high percentage of expired state-issued NPDES permits—currently 68% of all NPDES individual permits—with some overdue for renewal by 20 or more years. EPA itself has recognized the effect of this backlog noting that: "[t]he high permit backlog impacts many aspects of Oregon's NPDES program. As the permit backlog persists, DEQ is in effect deferring implementation of new standards and TMDLS, in large measure by not providing the permitting rationale for facility upgrades that are needed to improve water quality." UNITED STATES ENVIRONMENTAL PROTECTION AGENCY REGION 10, U.S. ENVIRONMENTAL PROTECTION AGENCY FINAL PERMIT QUALITY REVIEW FOR OREGON, at 6 (2016). This backlog is also considerably higher than the 10% backlog EPA expects states to maintain. *Id.* This delay in turn both harms the environment and undermines the work NWEA has undertaken to improve water quality and water quality standards in Oregon. Finally, this practice is also flatly inconsistent with the Clean Water Act and state regulations requiring NPDES permits to be renewed every five years. 33 U.S.C. § 1342(b)(1)(B); OAR 340-045-0035(8).

### **Documents Requested**

Requests for EPA records are governed by EPA's FOIA regulations. *See* 40 C.F.R. Ch. I, Subch. A, Pt. 2, Subpt. A. Pursuant to these regulations, NWEA requests that EPA provide *any and all documents* prepared or utilized by, in the possession of, or routed through EPA dating back to January 1, 2011 related to DEQ's NPDES permit backlog and practice of administratively continuing permits.

In answering this request, please consider "documents" to include: reports, memoranda, internal correspondence, including electronic mail or other communications, policy and scientific reports, meeting notes, and summaries of conversations and interviews, computer records, and other forms of written communication, including internal staff memoranda. This request also covers any non-identical duplicates of records that by reason of notation, attachment, or other alteration or supplement include any information not contained in the original record. Additionally, this request is not meant to be exclusive of other records which, though not specifically requested, would have a reasonable relationship to the subject matter of this request.

We emphasize that this request applies to all described documents whose disclosure is not expressly prohibited by law. If you should seek to prevent disclosure of any of the requested records, we request that you: (i) identify each such document with particularity (including title, subject, date, author, recipient, and parties copied), and (ii) explain in full the basis on which non-disclosure is sought. Additionally, if any information or documents are withheld, please explain how EPA reasonably foresees that disclosure would harm an interest protected by a specific FOIA exemption, or how the disclosure of such information or documents is prohibited by law. In the event that you determine that any of the requested documents cannot be disclosed in their entirety, we request that you release any reasonably redacted or segregable material that may be separated and released. Furthermore, for any documents, or portions thereof, that are



determined to be potentially exempt from disclosure, we request that you exercise your discretion to disclose the materials, absent a finding that sound grounds exist to invoke an exemption. NWEA reserves the right to appeal any denial.

If there are documents that you suspect we may already have or will not desire, please feel free to call us and ask in order to avoid waste and/or delay. If there are any categories of materials that you do not believe we would find useful, please contact us to discuss a possible narrowing of this request.

### **Fee Waiver Request**

We hereby request a waiver of fees for costs incurred in locating and duplicating these materials, pursuant to 5 U.S.C. § 552(a)(4)(iii), because disclosure "is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester."

Where an organization seeking a fee waiver has explained its ability to disseminate information to the public by way of presentations to the public, other public interest organizations, participation in conferences, articles in various media and through its website, a court held that the group had met the dissemination prong of the public interest test:

Other courts have found requestors' statements of intent to disseminate requested information through newsletters, popular news outlets, and presentations to the public interest groups, government agencies and the general public sufficient to entitle an organization to a fee waiver . . . . Therefore, in light of [Western Watersheds Project's (WWP)] statements, the Court finds that WWP adequately detailed its ability and intent to publicize the disclosed information to more than just a narrow segment of the public. Moreover, the Court finds that if it adopted the BLM's position [that WWP would only disseminate information to a narrow audience], it would set the bar for fee waivers impermissibly high, especially in light of Congress' intent to have the fee waiver liberally construed.

*W. Watersheds Project v. Brown*, 318 F.Supp.2d 1036, 1041 (D. Idaho 2004). Moreover, courts have held that if it is a close call as to whether a requestor has met one of the factors, in light of Congressional intent that the fee waiver provision be liberally construed, a non-commercial entity should be given the benefit of the doubt and be granted the fee waiver. *Forest Guardians v. Dept. of Interior*, 416 F.3d 1173, 1181-82 (10th Cir. 2005). Likewise, the court in *Southern Utah Wilderness Alliance v. BLM* held that an organization's statements describing how it has commented on similar issues in federal proceedings and issued a report on a similar matter was sufficient to show it had the expertise and ability to disseminate the requested information. 402 F. Supp.2d 82, 87-88 (D.D.C. 2005). Furthermore, as some of the requested records may include evidence of agency inaction, a court has found that a requestor's statements concerning the agency's failure to meet statutory requirements and how the requested records would shed light on those failures was sufficient to demonstrate that the request would make a significant contribution to the public understanding. *Physicians Comm. for Responsible Medicine v. Dept. of Health and Human Serv.*, 480 F.Supp.2d 119, 122-23 (D.D.C. 2007). The following is a response to EPA's fee waiver requirements set out in 40 C.F.R. § 2.107(l).

**A. Whether the subject of the requested records concerns “the operations or activities of the government.”**

This request concerns documents related to DEQ’s failure to act in a timely fashion upon NPDES permit renewal applications, EPA’s knowledge regarding this failure, and communications between the two agencies regarding this failure. As such, this request concerns “the operations or activities of the government” because EPA is an agency of the federal government and because the subject of the requested records is directly connected to government operations and activities associated with the implementation of the NPDES permitting program. Therefore, this fee waiver request involves records that are readily identifiable as limited to “the operations or activities of the government,” specifically the operations and activities of EPA’s oversight of DEQ’s implementation of the Clean Water Act and the NPDES permitting program.

**B. Whether the disclosure is “likely to contribute” to an understanding of government operations or activities.**

Second, disclosure of the requested information is likely to contribute to public understanding of the operations or activities of EPA and DEQ because disclosure will provide NWEA members and interested members of the public with valuable information regarding Oregon’s NPDES permitting program. Currently, the information that is publicly available regarding EPA’s knowledge and consideration of DEQ’s failure to effectively implement the NPDES permitting program is scant. Therefore, release of the records will most certainly contribute to an understanding of whether and how EPA intends to ensure that DEQ’s failure to effectively implement the NPDES permitting program is remedied.

Furthermore, disclosure of the requested materials will assist NWEA in evaluating EPA’s oversight of DEQ’s NPDES permitting program. For this reason, reviewing records of EPA’s action and rationale for action or inaction will be “meaningfully informative” and is also likely to contribute to an understanding of EPA’s position regarding DEQ’s failure to effectively implement the NPDES permitting program.

Having such information is “meaningfully informative” in that it ensures NWEA does not engage in frivolous or unfounded litigation and so that it can help the public understand what is or is not happening to ensure the consistency of all regulatory programs with federal law.

**C. Whether disclosure of the requested information will contribute to “public understanding.”**

Disclosure of the requested records to NWEA will contribute to public understanding because NWEA has expertise in the subject area of the requested records, an intention to disseminate the information obtained, and the connections with organizations and individuals across the country who are most likely to use the information contained within the records. NWEA has a track record of working with people as far away from Oregon as Florida to assist them by conveying our understanding of EPA policies. NWEA is also known for being generous with its time and information, despite its extremely limited resources. At a minimum, the audience for the information that NWEA has requested is environmental, fishing, tribal, and health organizations in Oregon who are interested in ensuring that NPDES permitting is



conducted in a way that is sufficiently protective of human health, fish, and wildlife. In addition, NWEA has shared similar information with state agencies, federal employees, tribal governments, as well as representatives of municipal and industrial dischargers. NWEA will continue to share records as well as information analyzed from records with this same list of interest holders.

In addition to using its relationships and networks with environmental organizations and environmental attorneys across the country, NWEA will also disseminate the records and/or its analysis of the records through the following means: from its website, on document sharing sites, commentary to the press, public forums in which it participates, in its newsletters, emails to networks of organizations, formal public comments and other formal documents prepared for agencies, and possibly in litigation.

NWEA's investigation and evaluation of the records will be made available to many other parties after it has been completed. NWEA will use the records requested to evaluate DEQ's failure to effectively implement the NPDES permitting program. NWEA's dissemination of the records and of its own evaluation of the records will educate the public and advance public understanding of DEQ's failure, the associated environmental consequences, and what may be done to remedy it. Thus, the release of these records will significantly contribute to the public's understanding of EPA's oversight over Oregon's NPDES permitting program.

NWEA has both the ability to interpret and to disseminate the records and/or information from this request because of its participation in all regulatory processes that take place under the Clean Water Act. NWEA has the expertise to evaluate this information and is able to disseminate the information from the records, or the records themselves, directly and indirectly with public interest organizations involved in state water pollution regulatory activities through emails, phone calls, meetings, list serves specifically devoted to communications between public interest organizations, and through its website.

**D. Whether the disclosure is likely to contribute "significantly" to public understanding of government operations or activities.**

Courts have held that the factor of whether the disclosure will contribute "significantly" to the public understanding is satisfied where the information requested is new, would supplement information currently available to the public, or add to the public oversight of the government's activities. *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1286 (9th Cir. 1987); *Judicial Watch of Florida v. U.S. Justice Dept.*, 1998 U.S. Dist. LEXIS 23441, at \*8 (D.D.C. 1998). Little of the requested information has not, to the best of NWEA's knowledge, been released to the public and, therefore, qualifies as new. *Or. Natural Desert Ass'n v. U.S. Dept. of Interior*, 24 F. Supp. 2d 1088, 1095 (D. Or. 1998) (finding that information supporting a Bureau of Land Management NEPA analysis, but which had not been released publicly, was new for the purposes of FOIA fee waiver).

Additionally, to the degree that any information has been made public—for instance, in EPA's Final Permit Quality Review for Oregon—the records that are the subject of this request will supplement the information currently available to the public. For instance, EPA stated that "DEQ and EPA need to work on an approach to reduce the backlog and maintain timely issuance of permits." UNITED STATES ENVIRONMENTAL PROTECTION AGENCY REGION 10, U.S. ENVIRONMENTAL PROTECTION AGENCY FINAL PERMIT QUALITY REVIEW FOR OREGON, at 6 (2016). However, EPA has said little publicly regarding how DEQ and EPA may work together



to reduce Oregon DEQ's growing backlog of expired and administratively continued NPDES permits.

Finally the disclosure of the requested records will add to the public's oversight over government activities because it will inform the public more fully of the reasons for DEQ's failure to effectively administer its NPDES permit program and what EPA intends to do to rectify the situation, if anything.

Release of the records requested will also contribute to the ability of nonprofit public interest oversight organizations such as NWEA to oversee the activities and inactions of EPA and its interactions with state regulatory agencies. In general, such organizations need to understand how and why the government has adopted various policies, whether formally or informally, or has chosen not to adopt a consistent policy, in order to review, comment on, and question the application of those policies in EPA actions and inactions and in state actions.

This request seeks records concerning EPA's oversight of DEQ's failure to issue NPDES permits in a timely manner and DEQ's practice of failing to act on completed applications for renewal resulting in NPDES permits being "administratively continued." Obtaining the requested records will allow NWEA to understand EPA's oversight of DEQ and take appropriate action to ensure the requirements of the Clean Water Act are met in Oregon. Understanding EPA's oversight of DEQ's implementation of the NPDES permit program will also allow NWEA to meaningfully participate in its public oversight watchdog function. NWEA will additionally disseminate the information to organizations it works with across the country through list serves, websites, meetings, memoranda, and direct sharing of the records.

#### **E. Disclosure is not in the Commercial Interests of NWEA.**

In determining whether disclosure is not primarily in the commercial interest of the requester EPA considers "[w]hether the requester has a commercial interest that would be furthered by the requested disclosure[.]" 40 C.F.R. § 2.107(l)(3)(i), and "[w]hether any identified commercial interest of the requester is sufficiently large, in comparison with the public interest in disclosure, that disclosure is 'primarily in the commercial interest of the requester.'" *Id.* at § 2.107(l)(3)(ii). According to the Ninth Circuit, "FOIA is to be liberally construed in favor of waivers for noncommercial requesters." *Env'tl. Prot. Info. Ctr. v. U.S. Forest Serv.*, 432 F.3d 945, 947 (9th Cir. 2005) (internal quotations and citations omitted).

There is no such concern here. NWEA has no commercial interest that would be furthered by the requested disclosure. NWEA has no mechanism to obtain funds from the use of the records, does not promote the records or analysis of them as a commercial concern, and its website contains no links to commercial interests. Rather, NWEA is a non-profit public interest environmental advocacy organization working to protect public health and the environment in the Northwest and across the country. Therefore, the considerations of 40 C.F.R. § 2.107(l)(1), with regard to the possible commercial interests of NWEA, are inapplicable because NWEA has no commercial interests and will realize no commercial benefit from the release of the requested information or as a result of any subsequent analysis it may perform on the records sought.

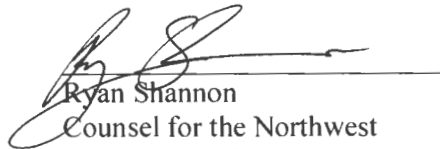
Further, since NWEA does not have a commercial interest in disclosure, the public interest here clearly outweighs any other interests. Even assuming, *arguendo*, that NWEA has a commercial interest, NWEA's primary interest is to inform the public of the activities of EPA regarding an issue that will directly affect the public's interest in and use of Oregon's waters. In conclusion, for the reasons set forth above, NWEA is clearly entitled to receive a public interest

fee waiver for this FOIA request.

### **Conclusion**

Earthrise Law Center is representing NWEA for purposes of this FOIA request. As provided by FOIA, 5 U.S.C. § 552(a)(6), we trust that we shall receive a reply to this request within twenty business days of receipt. Thank you for your time and attention in this matter, and we look forward to hearing from you shortly. If you have any questions, feel free to contact Ryan Shannon at Earthrise Law Center, using the contact information set forth above, who is providing NPCA with legal representation regarding this FOIA request.

Sincerely,



Ryan Shannon  
Counsel for the Northwest  
Environmental Advocates